85-1260

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JIMMY DALE LOWE,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

---

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QUESTION PRESENTED FOR REVIEW

Is it a violation of the Fourth Amendment for the police to detain and interrogate a person without any prior individualized suspicion that such person is guilty of any crime at a temporary drunk driving roadblock or "sobriety checkpoint" where the roadblock is operated under internal police regulations and where there is no showing that alternative, less-intrusive methods of detecting drunk drivers are ineffective?

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Petitioner, Jimmy Dale Lowe, a resident of Virginia, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Virginia entered in this proceeding on November 27, 1985.

OPINION BELOW

The opinion of the Supreme Court of Virginia is reported in 230 Va._____, 1985 and 2 VLR 738, 1985. (Attached as Appendix A).

JURISDICTION

The Court in this instance is requested to review the decision of the Supreme Court of Virginia entered on November 27, 1985.

This Court's jurisdiction in this matter is pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question involved in this case is whether the Petitioner's rights under

the Fourth Amendment to the United States Constitution were violated, to-wit:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FACTS AND STATEMENT OF THE CASE

The facts are essentially undisputed. Beginning on the night of December 30, 1983, and continuing on every subsequent Friday and Saturday evening between the hours of 11:00 P.M. and 3:00 A.M., through the date of Petitioner's trial in the Circuit Court on June 21, 1984, the Charlottesville Police had been conducting sobriety check roadblocks. These driving

under the influence or DUI roadblocks were conducted pursuant to a year-long federal grant from the U.S. Department of Transportation which will evaluate the program for its impact on drunk driving. Prior to Petitioner's arrest the effectiveness of the roadblocks in identifying and catching drunk drivers was unknown.

During the early morning hours of January 28, 1984, Petitioner was operating a motor vehicle and was stopped at a roadblock in the City of Charlottesville which had been set up by the police ostensibly as a "License and Sobriety Checkpoint." Information as to the location of the roadblock was not available to the public prior to the event. The roadblock was designed in such a fashion so as to make it impossible for a motorist to avoid it once having been alerted to the impending

roadblock from a sign which had been erected.

Prior to Petitioner's being stopped no one had observed anything in his driving or behavior to suggest that he was a DUI suspect. After the stop, the officer questioned the Petitioner, noticed that the Petitioner's eyes were red, and smelled the odor of alcohol. Petitioner was then directed to pull off to the side of the road where he failed three dexterity tests. At that point he was arrested on the charge of operating a motor vehicle on the public highway while under the influence of alcohol or other self-administered intoxicant or drugs. He subsequently submitted to a breathalyzer test which was administered in a mobile van police unit that had been parked on the side of the road at the scene of the roadblock.

The test showed a blood alcohol content in excess of the legal limit.

At trial before the General District Court of the City of Charlottesville on April 3, 1984, Petitioner was convicted of DUI. He appealed to the Circuit Court for the City of Charlottesville.

Prior to the trial de novo in the Circuit Court, Petitioner was heard on a two-count motion to suppress all evidence gathered or derived from the DUI roadblock seizure. The Circuit Court heard evidence on the motion to suppress but deferred ruling on it, and then heard evidence on the case-in-chief. Thereafter, the court held Petitioner's Fourth Amendment rights were not violated by the seizure in question. (Letter opinion, Appendix B). Accordingly, Petitioner was found guilty

of the charge and an order was entered to the same effect on June 27, 1984. (Appendix C). From this conviction Petitioner appealed to the Supreme Court of Virginia which affirmed the trial court in an opinion and judgment entered on November 27, 1985. (Appendix A).

The federal constitutional question raised in this appeal was raised in the trial court and throughout the trial, and was again raised in the Petition for Appeal, briefed, and argued in the highest court in the Commonwealth of Virginia. The court in each instance failed to rule that the seizure at issue violated the Petitioner's rights under the Fourth Amendment to the United States Constitution, the Virginia Supreme Court holding "balancing the State's strong interest in protecting the public from the grave

risk presented by drunk drivers, against the minimal inconvenience caused motorists approaching the roadblock, we hold that the action of the police in this case was not an impermissible infringement upon defendant's reasonable expectation of privacy." See App. A, pp. 18-19.

REASONS FOR GRANTING WRIT OF CERTIORARI

A. STATE COURT DECISIONS ARE IN CONFLICT ON THE CONSTITUTIONALITY OF DRUNK DRIVING OR "SOBRIETY CHECK" ROADBLOCKS.

The decisions of state courts that have considered "sobriety check" roadblocks are not in accord. A number of recent decisions have held such roadblocks illegal. State v. Koppel, 499 A.2d 977, 37 Cr.L. 2441, New Hampshire Supreme Ct., (8/16/85); State v. Smith, 674 P.2d 562, (Okla. Crim. App. 1984); State v. Olgaard,

248 N.W.2d 392 (S.D. 1976); Webb v. State, 695 S.W.2d 676 (Tex. App. 5 Dist.1985); State v. Marchand, 706 P.2d 225 (Wash. Supreme Ct. 1985); State v. McLaughlin, 471 N.E.2d 1125 (Ind. App. 4 Dist. 1984).

Other state courts, however, have incorrectly relied on this Court's dicta in Delaware v. Prouse, 440 U.S. 648 (1979), to uphold sobriety roadblocks. State v.Super.Ct. In & For County of Pima, 143 Ariz. 45, 691 P.2d 1073 (1984); People v.Conway, 135 Ill. App.3d 887, 482 N.E.2d 437 (1985); State v. Garcia, 481 N.E.2d 148 (Ind. App. 1 Dist. 1985); State v. Deskins, 234 Kan. 529, 673 P.2d 1174 (1983); Little v. State, 300 Md. 485, 479 A.2d 903 (1984); Commonwealth v. Trumble, 396 Mass. 81, 483 N.E.2d 1102 (1985); State v. Coccomo, 177 N.J. Super. 575, 427 A.2d 131 (1980); People v. Scott, 473 N.E.2d 1, 63 N.Y.2d 518, 483 N.Y.S.2d 649 (1984); State v. Martin, 496 A.2d 442

(Vt. 1985); People v. Bartley, 125 Ill. App.3d 575, 466 N.E.2d 346 (Ill. App. 1984) rev'd Ill. Sup. Ct. 11/20/85, ___ Ill. ___, ___ N.E.2d ___,38 Cr. L. 2203.

In Prouse, this Court suggested that its holding did not preclude states "from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." 440 U.S. at 663.

Petitioner submits that the better reasoned opinions have distinguished border and license checkpoint stops, where there is an "absence of practical alternatives" for enforcement available (United States v. Brignoni-Ponce, 422 U.S. at 881), from DUI roadblocks, and have held that the state has failed to prove as a matter of law that the seizure advances

the public interest more effectively than traditional methods of observing and apprehending drunken drivers.

> To justify the search or seizure of a motor vehicle, absent probable cause or even a reasonable suspicion that a criminal offense is being committed, the State must prove that its conduct significantly advances the public interest in a manner that outweighs the accompanying intrusion on individual rights. It must further prove that no less intrusive means are available to accomplish the State's goal. . . .
>
> . . . "[I]n cases where the Supreme Court has either expressly or impliedly sanctioned checkpoint stops, the criminal activity targeted was of such a nature that there was no other less intrusive but equally effective means of detecting violators. Transporters of illegal aliens and violators of license and safety equipment laws can rarely be detected by observing traffic. In contrast, the foremost method of detecting drunk drivers has been by observing driving behavior." (citation omitted).

State v. Koppel, 499 A.2d at ____, 37 Cr.L. at 2442.

As this Court noted in Prouse, "[t]he foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations." 440 U.S. at 659.

Petitioner submits that some state courts, including the Virginia Supreme Court in the instant case, are establishing precedents which would permit the use of roadblocks for whatever purpose which happens to suit the climate at a particular time. As one author noted, "The specter of roadblocks becoming a common feature of everyday life is not simply another trite Orwellian prophecy." "The Drunk-Driving Roadblock: Random Seizure or Minimal Intrusion?" 21 Crim. Law Bull. 197 at 215 (1985). A concern for

this prompted the court in State v. Smith, 674 P.2d 562, at 564, to observe:

> The Court finds such activities by law enforcement authorities, while commendable in their ultimate goal of removing DUI offenders from the public highways, draw dangerously close to what may be referred to as a police state. . . . The Court is not so naive to think that criminal conduct does not occur regularly in the form of DUI offenders. Yet, a basic tenet of American jurisprudence is that the government cannot assume criminal conduct in effectuating a stop such as the one presented herein.

Thus, in State v. McLaughlin, 471 N.E.2d 1125 (Ind. App. 4 Dist. 1984), after an extensive survey of state and this Court's decisions on roadblock seizure cases, the court held, under the three-part analysis of Brown v. Texas, 443 U.S. 47, 50-51 (1979), that although the state had met the standards of the first element by demonstrating a "grave public concern," it had failed to adequately

demonstrate that the method used "advanced the public interest" sufficiently to outweigh the "severity of interference with individual liberties."

> In summary of the government interest side of the Brown balancing test, we find that, although the gravity of the public interest served by the roadblock seizure -- identifying and apprehending drunk drivers -- is enormous, the state presented no evidence that the roadblock procedure advanced this public interest to any degree greater than would have been accomplished by more traditional, less intrusive methods based on individualized suspicion.

471 N.E.2d at 1138.

One means by which the balancing scales of the Brown test might be weighted in favor of the governmental interest is for the state legislature to enact a bill on the subject at issue. A more conclusive instance of a compelling state interest cannot be given. This has not

been done in Virginia. Thus, police officers and other local public officials, under the guise of a statutory right to stop for driver licensing checks, are the only ones who are asserting that there is a governmental interest at stake here.

Information relating to the effectiveness of the roadblock method is essential to assessing the reasonableness of the intrusion created by the DUI roadblock, "Curbing the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures," 71 Geo. L.J. 1457, 1470-1471. As shown above, several courts have struck down sobriety checkpoints as unreasonable intrusions into the citizen's reasonable expectations of privacy where the state could not demonstrate that the effectiveness of the method adequately compensated for the Fourth Amendment intrusions it created. In the case

at bar there was no such demonstration by the state. When questioned about the impact of DUI roadblocks on drunk driving, Chief Bowen of the Charlottesville Police testified, "I haven't seen anything that says you identify more this way or that you identify less." When asked what the impact of the roadblocks has been on identifying and catching drunk drivers, Chief Bowen replied, "I don't know."

Similarly, the Department of Transportation has stated that "[S]afety checkpoints limitations are that they have not proven cost effective when used solely for producing DWI arrests . . . the effectiveness of different screening techniques in detecting impaired drivers and influencing their perception of the risk of being detected is unknown." "The Use of Safety Checkpoints for DWI Enforcement," published by the U.S. Department of

Transportation, National Highway Traffic Safety Administration, Office of Alcohol Countermeasures and Office of Driver and Pedestrian Research (September, 1983) p. 2.

Petitioner submits that this failure to satisfy the standards for the second part of the three-part analysis formulated in Brown, in itself provides sufficient grounds to invalidate the roadblock on Fourth Amendment grounds.

While there is little doubt that the concerns raised and problems posed by drunk driving roadblocks are properly the concern and responsibility of the state legislature and not a local police officer, the state court decisions do not adequately address this issue. Absent a state-wide, uniform solution to the problem, the citizens of this Commonwealth are left to the unfettered discretion of

the local police, which may or may not be exercised properly. For example, motorists in Virginia under the present scenario are potentially subject to numerous seizures at multiple roadblocks both intra-and inter-city without having ever been suspected of committing the slightest infraction. Even the Deskins Court concluded that "it might well be advisable that minimum uniform standards for the operation of vehicular roadblocks be adopted and established by the legislature or attorney general, rather than leave the determination thereof to local officials." State v. Deskins, 673 P.2d at 1185.

Because of the conflict and confusion among the various states in applying this Court's holding in a drunk driving roadblock situation, this Court's guidance is urgently needed.

B. THE DRUNK DRIVING ROADBLOCK AT ISSUE IN THIS CASE WAS CARRIED OUT UNDER STRINGENT POLICE-PROMULGATED REGULATIONS.

The Charlottesville roadblock was effected without specific statutory authorization. Thus, the state legislature had not enacted legislation prescribing the manner in which the roadblock was conducted. However, as the Virginia Supreme Court noted, the Charlottesville plan was adopted after "extensive research" and resulted in an elaborate manual of procedures and extensive training of police officers who were to man the roadblock. (App. A, p. 13-14). Both the manual and the training were developed in conjunction with the Federal Department of Transportation. The Charlottesville roadblock was intended to be, and arguably was, a model of how such a roadblock should be conducted in an

attempt to minimize both subjective and objective intrusion to the individual. The result prompted the Virginia Supreme Court to state that "the Charlottesville system is safe and objective in its operation, employs neutral criteria, and does not involve the standardless, unbridled discretion by the police officer in the field, which was condemned in Prouse." (App. A, p. 19).

Because this roadblock was intended as a model, it is particularly appropriate for this Court to review and reverse the decision holding that Petitioner's Fourth Amendment rights were not violated. Even a "model" roadblock which permits police officers to detain and interrogate individuals in the absence of any "individualized suspicion" to detect criminal activity which can be detected by other means is a violation of the Fourth Amendment.

C. THIS COURT'S DICTA IN DELAWARE v. PROUSE ARE BEING MISAPPLIED BY THE STATE COURT.

As discussed above, Petitioner submits that the instant case provides the Court with the appropriate fact situation to apply the Brown analysis to a roadblock which seeks to detect crime which is unrelated to state licensing and registration laws. Thus, this Court can clarify and limit the Prouse dicta that "questioning of all oncoming traffic at roadblock stops is one possible alternative." 440 U.S. at 663.

Petitioner submits that this Court meant its statement in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), that the requirement of "some quantum of individualized suspicion" is ordinarily a prerequisite to a constitutional search or seizure. Id. at 561. The Court found the

fixed citizenship roadblock in Martinez-Fuerte constitutional as an instance of where the "individualized suspicion" requirement could not be applied.

Martinez-Fuerte is an example of where "questioning of all oncoming traffic at roadblock stops" is appropriate. There are no alternative means of detecting illegal aliens. Similarly, the "questioning of all oncoming traffic at roadblock stops" may be necessary to enforce licensing and registration laws.

Petitioner submits that the intrusion involved in both of these types of stops (citizenship and license/registration) is truly minimal. In theory, compliance with the officer's request can be had by the individual handing his or her license, registration, or evidence of citizenship to the government agent through the automobile vent window.

In contrast, DUI or "sobriety check" roadblocks involve an intimate examination of the person. They are the essence of intrusion. State courts upholding the DUI roadblock (and those finding it unconstitutional) have failed to focus on the fact that the object of the detention and interrogation is to determine the contents of an individual's insides.

Petitioner submits that "individualized suspicion" cuts with two edges against conduct injurious to an individual's rights. First, it precludes discrimination or an opportunity for discrimination. Second, it assures law-abiding citizens of freedom from intrusion, of any kind, by government agents.

Thus, the requirement of "individualized suspicion" should only be dispensed

with when the opportunity for discrimination is neutralized and when there is no alternative consistent with the law-abiding citizen's right to be left alone. Petitioner submits that to sustain an intrusion which is more than de minimis, there must be a showing that there is no less-intrusive method.

In the border situation, illegal aliens, unchecked, can result in the destruction of our society. And, there is no alternative to an ID check to identify illegal aliens. In the license situation, there is no alternative to an ID check to identify the unlicensed drivers and unregistered vehicles. Furthermore, the intrusion is truly minimal. It is possible to comply with a license and registration check with no personal intrusion. Petitioner submits that compliance with a license/registration check could involve

handing a card to the officer:

> I am exercising my rights under the Fourth and Fifth Amendments to the United States Constitution. I will not answer any questions. I will not roll my window down. Upon your request, I will hand my license and registration through the window. Upon your request, I will sign my name to compare with the signature on the license and registration.

In marked contrast, it is not an ID, license, registration, or other papers permitting travel that interests the government agent at the DUI roadblock. It is the person -- indeed, the person's insides. The police officer wants to examine and poke and prod and interrogate the driver to find out what he or she is about, and what he or she has been doing. The object of such roadblock is, fundamentally, intrusive and, Petitioner submits, not intended to be sanctioned by this Court's dicta in Delaware v. Prouse.

CONCLUSION

For the aforesaid reasons, a Writ of Certiorari should issue to review and reverse the judgment and opinion of the Supreme Court of Virginia.

Respectfully submitted,

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APPENDIX A

Present: All the Justices

JIMMY DALE LOWE

OPINION BY
JUSTICE A. CHRISTIAN COMPTON
November 27, 1985

v. Record No. 841618

COMMONWEALTH OF VIRGINIA

FROM THE
CIRCUIT COURT OF THE CITY
OF CHARLOTTESVILLE
Herbert A. Pickford, Judge

The question for decision in this criminal case is the legality of a roadblock established for the purpose of checking the sobriety of motor vehicle operators.

On Saturday, January 28, 1984, at 1:55 a.m., defendant Jimmy Dale Lowe was operating a motor vehicle south on Avon Street across a bridge in the City of Charlottesville. The city police had established a roadblock at the south end

of the bridge about three hours earlier. The roadblock was announced to motorists by a sign, stating "License and Sobriety Checkpoint, Prepare to Stop," located on the crest of the bridge facing southbound traffic.

After crossing the bridge, defendant proceeded into the roadblock and stopped where city police patrolman Lawrence B. Brown was standing. Brown had not observed defendant drive erratically nor was there any other indication that defendant was driving while intoxicated. Brown asked for defendant's operator's license, which defendant handed to Brown. While talking to defendant to verify his address, the officer noticed defendant's eyes "were very red" and Brown smelled the odor of alcohol about defendant's

person. The officer directed defendant to drive his vehicle "around the corner off of the bridge" to enable other vehicles to come to the checkpoint. The officer next asked defendant to step out of his vehicle and to perform three dexterity tests, which defendant failed. Defendant then was arrested for driving under the influence of alcohol (DUI). See Code § 18.2-266. He elected to have his breath analyzed. A police van was located at the scene for the purpose of administering such tests. The test showed that defendant's blood alcohol content was .17, an amount which raises a presumption of intoxication. See Code § 18.2-269.

Defendant was convicted of the charge in the general district court and he appealed to the circuit court. Prior

to trial in the circuit court, defendant filed a motion to suppress all evidence derived from the stopping of his vehicle on the ground that his constitutionally protected right against unreasonable seizures was violated. Sitting without a jury, the circuit court heard the evidence on the motion together with evidence on the merits of the case. The court denied the motion and found defendant guilty as charged, giving rise to this appeal.

Specifically, the issue before us is whether the seizure of defendant under the circumstances of this roadblock was unreasonable under the Fourth and Fourteenth Amendments to the

United States Constitution, and art. I, § 10 of the Constitution of Virginia.[1]

The applicable provisions protect, of course, only expectations of privacy that are reasonable. Katz v. United States, 389 U.S. 347, 351-53 (1967). Nevertheless, a person

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[1]The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Local law enforcement personnel are subject to the requirements of the Fourth Amendment under the due process clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

"operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." Delaware v. Prouse, 440 U.S. 648, 662 (1979). And stopping a

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Article I, § 10 of the Virginia Constitution provides:

> "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

The Virginia requirements, under our constitution and the statutes implementing the constitutional provision, are "substantially the same as those contained in the Fourth Amendment." A. Howard, I Commentaries on the Constitution of Virginia 182 (1974). See Tri-Pharmacy, Inc. v. United States, 203 Va. 723, 728, 127

motor vehicle and detaining the operator constitute a "seizure" within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention is quite brief. Leeth v. Commonwealth, 223 Va. 335, 340, 288 S.E.2d 475, 478 (1982), citing Prouse, 440 U.S. at 653. Therefore, the pertinent inquiry here is whether defendant's detention, when he was stopped at the initial checkpoint at the south end of the bridge, was constitutionally unreasonable.

S.E.2d 89, 92 (1962), cert. denied, 371 U.S. 962 (1963); Zimmerman v. Town of Bedford, 134 Va. 787, 801-02, 115 S.E. 362, 366 (1922). The Fourth Amendment is but declaratory of the common law on the subject. McClannan v. Chaplain, 136 Va. 1, 14, 116 S.E. 495, 498-500 (1928). Thus, we will focus on the Fourth Amendment in discussion of the issue presented.

During the last decade, the Supreme Court of the United States has decided four cases which impact the constitutional validity of roadblock stops of vehicles. United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (random stops of vehicles near Mexican border to detect entry of illegal aliens ruled invalid); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (permanent checkpoint stops to stem flow of illegal alien traffic from Mexico approved); Delaware v. Prouse, supra; and Brown v. Texas, 443 U.S. 47 (1979). Although the Court has not ruled directly on the validity of roadblock seizures employed to detect drunk drivers, it has fixed definite limitations of the right of police to maintain roadblocks under the Fourth

Amendment. Basically, law enforcement personnel may not stop motorists in a wholly random and discretionary manner unless there is, at least, articulable and reasonable suspicion either that the operator is unlicensed, the vehicle is unregistered, or the operator or other occupant is subject to seizure for violation of law. The Court in Prouse, however, in striking down a random, discretionary stop made to check license and registration, said in dicta:

"This holding does not preclude the . . spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers." 440 U.S. at 663.

Cf. Virginia Code § 46.1-7(c) (requiring operators of vehicles to stop upon

command of a police officer to exhibit drivers' licenses).

Subsequently, the Court in Brown v. Texas, supra, stated that the reasonableness of seizures, less intrusive than traditional arrests, depends on a balancing test. In declaring the application of a Texas stop-and-identify statute unconstitutional, the Court set forth three criteria by which the validity of such seizures should be gauged. There must be a weighing of (1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty. 443 U.S. at 50-51. The Court, in Brown, noted that a "central concern" in balancing the foregoing competing considerations has

been to make certain that "an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." Id. at 51. Thus, the Court said, "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of the individual officers." Id.

The evidence in this case shows that defendant was not stopped because the police suspected that a crime had been, was being, or was about to be committed. Consequently, we must

examine the city's plan for maintaining this DUI roadblock to determine whether defendant was stopped pursuant to a practice embodying neutral criteria.[2]

According to the evidence, the first roadblock under the Charlottesville plan was set up on December 30, 1983, about a month before defendant's arrest. The city was asked to establish such a plan by representatives of the

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[2] The public interest in eliminating the drunken driver from the highways is overwhelming. "The carnage caused by drunk drivers is well documented and needs no detailed recitation here." South Dakota v. Neville, 459 U.S. 553, 558 (1983). But a number of state courts have determined that roadblocks used by police to detect drunk drivers run afoul of the Fourth Amendment, while other jurisdictions have found that such roadblocks do not offend the constitutional provisions.

For state cases finding such roadblocks invalid, see Jones v. State, 459 So.2d 1068 (Fla. Dist. Ct. App. 1984); State v. McLaughlin, 471 N.E. 2d

Virginia Alcohol Safety Program, working in conjunction with the federal Department of Transportation. The Charlottesville plan was adopted after extensive research. The police officials considered, among other things, the law on the subject, the safety of the police, and the safety of motorists. In

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1125 (Ind. Ct. App. 1984); State v. Koppel, ____ A.2d ___ (N.H. 1985); State v. Smith, 674 P.2d 562 (Okla. Crim. App. 1984); State v. Olgaard, 248 N.W.2d 392 (S.D. 1976); Webb v. State, 695 S.W.2d 676 (Tex. Ct. App. 1985).

For state cases approving DUI roadblocks, see State v. Super. Ct. In & For County of Pima, 691 P.2d 1073 (Ariz. 1984); People v. Conway, ____ Ill. App.3d ____, 482 N.E.2d 437 (1985); State v. Garcia, 481 N.E. 2d 148 (Ind. Ct. App. 1985); State v. Deskins, 673 P.2d 1174 (Kan. 1983); Little v. State, 300 Md. 485, 479 A.2d 903 (1984); Commonwealth v. Trumble, ____ Mass. ____, 483 N.E.2d 1102 (1985); State v. Coccomo, 177 N.J. Super. 575, 427 A.2d 131 (1980); People v. Scott, 473 N.E.2d 1, 63 N.Y.2d 518, 483 N.Y.S.2d 649 (1984); State v. Martin, 496 A.2d 442 (Vt. 1985).

addition, the police department analyzed the locations within the city where there had been drunk-driving arrests and alcohol-related accidents in order to determine the places where the check-points should be established.

The police officers to be assigned to the roadblocks were given 24 hours of training by outside experts and a manual of procedures was prepared entitled "Charlottesville Driver's License & Sobriety Checkpoint Program." The manual's preface, over the signature of the Chief of Police, states that the project was intended "to reduce the number of alcohol-related motor vehicle accidents" by using "license and sobriety checkpoints to aid in the detection and apprehension of drivers who are intoxicated or driving when not

properly licensed." The project, according to the manual, "is expected to increase public perception that drunk drivers will be caught and arrested, and will serve as a deterrent to the potential drunk driver."

Topics covered in the procedural manual include criteria for selection of a particular area for designation as a checkpoint site; provisions that a high-ranking police officer make the daily assignment of a previously designated site for operation of a roadblock and that such officer assign the personnel to work a particular roadblock; specific provisions for the manner in which a roadblock site should be manned and equipped; and detailed routine for bringing traffic to a stop, interviewing motorists, and

evaluation of an operator suspected of driving under the influence.

Testimony showed that extensive media publicity about the project took place before the first roadblock was set up on December 30th and that the few roadblocks that followed were widely publicized before the instant case arose. No publicity was given to the specific location of a checkpoint before it was established. The police were aware, however, that such information was shortly possessed by proprietors of local bars and restaurants who passed it to their customers.

At the time of defendant's arrest, five uniformed police officers, wearing reflector vests, were assigned

to the scene. The area and the warning sign were well-lighted. There were two marked police vehicles present with red lights flashing. The geography of the site permitted adequate space for the momentary initial detention to check licenses and to afford space for vehicles, whose operators required further evaluation, to pull aside. The officers at the checkpoint had no discretion regarding which vehicles to stop; every southbound vehicle was halted. If congestion occurred, vehicles were permitted to move through the checkpoint until the congestion cleared. The police endeavored to detain a motorist no more than 30 seconds for the license check.

During the brief time the plan had been in effect prior to trial, the

police noted favorable results of the roadblock procedure. More motorists were being identified who had license violations and other traffic infractions than had been detected using traditional patrol procedures. In addition, drunk drivers were being detected at lower blood alcohol content levels than had previously been identified using routine patrol methods.

We conclude that the trial court correctly ruled that the seizure of defendant upon the initial stop at the checkpoint in question was constitutionally valid. Balancing the State's strong interest in protecting the public from the grave risk presented by drunk drivers, against the minimal inconvenience caused motorists approaching the roadblock, we hold that the

action of the police in this case was not an impermissible infringement upon defendant's reasonable expectation of privacy. The Charlottesville system is safe and objective in its operation, employs neutral criteria, and does not involve standardless, unbridled discretion by the police officer in the field, which was condemned in Prouse.

Even though DUI roadblocks had been in operation only for a brief period, tangible results appeared that were not evident under traditional methods of detection. Moreover, the deterrent effect of such a highly publicized program is obvious; such a visible project is bound to increase the perceived risk of arrest in the minds of those drunk drivers who are never arrested.

Accordingly, the defendant's conviction will be

Affirmed.

APPENDIX B

Herbert A. Pickford, Judge
City Courthouse
315 E. High Street
Charlottesville, Virginia 22901
804-293-5859

David F. Berry, Judge
Madison, Virginia
E. Gerald Tremblay, Judge
Charlottesville, Virginia

F. Ward Harkrader, Jr., Judge
Louisa, Virginia

SIXTEENTH JUDICIAL CIRCUIT
Circuit Courts of the City of Charlottesville and the Counties of Albemarle, Culpeper, Fluvanna, Greene, Goochland, Louisa, Madison and Orange
June 26, 1984

Richard H. Barrick, Esq.
Commonwealth's Attorney
P. O. Box 911
Charlottesville, Virginia 22902

Robert H. Blodinger, Esq.
Attorney at Law
403 Park Street
Charlottesville, Virginia 22901

Re: Commonwealth v. Jimmy Dale Lowe

Gentlemen:

Defendant's motion to suppress places in issue (1) the constitution-

ality of the procedure by which he was stopped and detained by the Charlottesville Police early January 28, 1984, and (2) the admissibility of the certificate of analysis relative to his blood alcohol content at the time.

Dealing with the certificate first, the results of the defendant's breathalyzer test are crucial to a conviction. Defendant's eyes were "very red," and there was an odor of alcohol on his breath according to Officer Larry Brown. Furthermore, the defendant failed three dexterity tests. The evidence did not tell us what those tests were. Defendant told the officer he had had a "couple of beers after getting off from work." We do not know when that occurred. Other than the test result,

this is the sum total of the evidence concerning defendant's intoxication. With the test result, the evidence convicts. Without it, it does not. The accuracy of the Smith and Wesson Breathalyzer Model 900A machine used to test the defendant is a matter of substance. The testing of the machine for accuracy is not classified as a matter of procedure in Code § 18.2-268(s). It fits into the same substantive category as do the test operator's qualifications. See Brooks v. City of Newport News, 224 Va. 311, where the operator's possession of a valid license was held to be a matter of substance.

The breath test certificate raises "a reasonable inference" that the test

performed upon a person was properly conducted in accord with the matters it represents to be true. It is incumbent upon the defendant to offer evidence to dispute this. See Calfee v. Commonwealth, 215 Va. 253 at page 255. Mr. Lowe contends that his test was not conducted in accord with the manufacturer's specifications in violation of Code § 18.2-268(r1). In support of this, he introduced as defendant's exhibit no. 2 the instruction manual for the breathalyzer in question and the September 10, 1982 Smith and Wesson Consumer Advisory setting out guidelines for testing of possible radio frequency interference on said machine (see defendant's exhibit no. 3). Defendant's exhibits indicate that a safe operating radius for the

machine is that it be at least twenty-five yards from a hand held radio transmitter. The evidence indicated the officer accompanying the defendant into the testing van may have had a transmitter with him, however there is no evidence it was being used for transmissions at the time. Defendant's exhibits further indicated the breathalyzer should be retested for accuracy if moved from one location to another. The evidence is that the breathalyzer is moved to the scene of each roadblock.

In view of the defendant's evidence, was the accuracy of the breathalyzer seriously placed in question? The answer is in the negative because Elwood Shifflett, operator of the machine, checked its accuracy before and

after the test with the use of a simulator. His description of his use of the simulator for that purpose conforms with Smith and Wesson's Instruction Manual (defendant's exhibit no. 2) at page 14. It says the simulator "provides a predictable alcohol reading, with which calibration and certification procedures may be performed." His calibration procedure showed a .10 reading which, according to the manual, indicates proper operation of the machine. Furthermore, the April 29, 1983 notification of the Department of General Services, Division of Consolidated Laboratory Services (defendant's exhibit no. 4) reported that any radio frequency signal interference with the breath test results on the Model 900A Breathalyzer

"is readily detectable by the breath test operator through unexplained movement of the needle of the instrument's null meter...." Operator Shifflett testified he could so detect such interference had there been any during defendant's breath test, and there was none.

As to the constitutionality of the stopping of Mr. Lowe, the Charlottesville Police Department employed the guise of an operator's license and registration check to afford its officers the opportunity to observe the appearance and behavior of the operators of automobiles they stopped the night of January 28, 1984, as they proceeded south from the Belmont Bridge. Their acknowledged purpose in this is to

apprehend drunk drivers and to make the public less likely to mix drinking and driving. The United States Supreme Court in Delaware v. Prouse, 440 US 648(1979), suggested roadblock detention as a possible alternative to the random stopping of vehicles which it found to be unconstitutionally intrusive into the Fourth Amendment rights of motorists. Virginia has accorded police the right to stop motorists under certain circumstances. In particular is Code § 46.1-7(c) which requires motorists to stop upon signal of a police official for the purpose of responding to his request for the operator to exhibit his registration card and/or operator's license. In discussing Virginia Code §§ 46.1-6, 46.1-7, 46.1-8 and 46.1-9, the Virginia Supreme Court, in its opinion of Shirley

v. Commonwealth, 218 Va. 49, recognized the legitimacy of such stops. At page 52 it stated, "It is routine for law enforcement officers to stop cars and to inspect automobile registration papers as well as operators' licenses. Viewing such papers is an accepted part of the regulatory system." While the Delaware v. Prouse case invalidates random stops for such purposes, Virginia's police are clearly authorized to conduct license and registration checks, and such authority is not negated by the fact that they simultaneously make observations of the operator for signs of inebriacy.

If the officer detects bloodshot eyes, slurred speech, or an odor of alcohol upon the operator's breath, such is sufficient basis for an articulable

suspicion that will justify a more intrusive detention for the conduct of sobriety tests. Failing them gives the officer probable cause for an arrest, following which the implied consent law's blood alcohol content tests are to be administered. In Leeth v. Commonwealth, 223 Va. 334 (1982), Virginia's Supreme Court indicated its acceptance of something less than probable cause as being adequate justification for the sobriety test phase of a motorist's detention.

Does Charlottesville's roadblock procedure, as applied in Mr. Lowe's case, afford the safeguards that the Constitutions of the United States and Virginia require? The measuring criteria that have evolved from numerous court

decisions are ably discussed in The Georgetown Law Journal, Volume 71 at page 1457 in an article titled "Curbing the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures," and also in State of Kansas v. Deskins, (Kan. 1983) 673 P.2d 1174. They indicate that Mr. Lowe was lawfully seized.

The principle criteria, as discussed in The Georgetown Law Journal article, are: (1) Site selection. Charlottesville's selection of its sites for roadblocks was based upon its empirical data adduced from the records of its police department and the experiences of its individual officers which pointed out areas high in alcohol related accidents. Safety of the motor-

ist and the officer is also of prime consideration in site selection; (2) Elimination of the individual officer's discretion. Charlottesville's manual (defendant's exhibit no.1) governing the roadblock procedure forbids arbitrary invasions of the privacy of motorists by individual officers in the exercise of their own discretion. Control of the operation is exercised by administrative personnel at headquarters. Execution of the procedure is conducted at the scene under the supervision of one officer, leaving to the individual policeman the sole discretion as to whether the motorist evidences sufficient signs of inebriacy to warrant further detention for sobriety testing and arrest if the officer finds probable cause as a result thereof; (3) Concern for the fright and

annoyance of the motorist. The physical characteristics of the roadblock make clear to the motorist that he is not being singled out by the police and that the roadblock is being conducted by the police. The prominent sign, properly illuminated so as to advise the motorist of the impending stop and the purpose therefor, as well as the uniformed officers and their vehicles with flashing lights evidence this; (4) Prior judicial approval of the temporary roadblock procedure. None is given for Charlottesville's procedure. I do not deem such essential to its validity; (5) Minimal detention. Less than thirty seconds is involved unless the officer requires sobriety testing. Ample evidence in the instant case warranted such test of Mr. Lowe; (6) Probable

cause necessary for the breathalyzer test, since this is the most intrusive of the sobriety tests. Probable cause existed justifying such test; and (7) Provision for heavy flow of traffic. It is permissible to allow a line of cars to pass through to alleviate a long tieup in traffic. This also lessens any annoyance to a motorist that may be incident to a roadblock. Once the traffic jam is gone, the stopping procedure is resumed. Discretion in the exercise of this lies with the supervising officer on the scene and is guided by the previous designation of certain geographical points at each site. If cars are backed up to that point, Chief Bowen testified that the supervising officer is to then permit the traffic so backed up to pass through.

Having concluded that the Commonwealth has met its burden of proof in this case, I find the defendant guilty as charged. The punishment will be the same as that imposed by the General District Court, plus costs.

Very truly yours,

S/

Herbert A. Pickford

HAP:jr

APPENDIX C

VIRGINIA: - AT A CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE, ON THE LAW SIDE THEREOF, HELD ON WEDNESDAY, JUNE 27TH, 1984.

Present:-Honorable HERBERT A. PICKFORD, Judge

COMMONWEALTH OF VIRGINIA Plaintiff

V. Appeal No. 84-43-1 - Operate a Motor Vehicle While Under the Influence of Alcohol or Other Self-Administered Intoxicants or Drugs (2nd Offense Within 5 Years)

JIMMY DALE LOWE Defendant
Date of Birth: 4/2/51

This matter having been taken under advisement on June 21, 1984, the Court, by letter opinion dated June

26, 1984, a copy of which is incorporated into, and made a part of, this Order, denied the Motion to Suppress filed on behalf of the defendant on June 12, 1984.

The Court finds the defendant guilty of the charge as set forth in the warrant and set punishment at a fine of $400.00, a jail sentence of thirty days, payment of court costs, and suspension of his driver's license for three years, with the fine and twenty-eight days of the jail term suspended and a restricted license to be issued for the purpose of the defendant's attending Virginia Alcohol Safety Action Program (VASAP) meetings.

The transcript is hereby made a part of the record.

The Court sets the appeal bond in the amount of $1,000.00 cash or corporate surety, or $2,000.00 property.

The defendant shall report to the Albemarle-Charlottesville Joint Security Complex by Noon on July 28, 1984 should he fail to post an appeal bond.

The defendant shall forthwith surrender his operator's license in accordance with Section 46.1-425 of the Code of Virginia, 1950, as amended.

Pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, counsel for the defendant objects to the ruling of the Court on the grounds that the decision of the Court is contrary to the law and to the evidence with respect to the grounds set forth in the

Defendant's Motion to Suppress, the additional grounds set forth in opening argument that even if the seizure was not in contravention of the State and Federal Constitutions, it was nevertheless in contravention of Virginia statutory and common law, there being no enabling statute permitting such seizure, and such other objections and exceptions as are set forth in the transcript.

Enter:

S/ HERBERT A. PICKFORD, Judge

S/ Richard H. Barrick
Commonwealth's Attorney

Objected to
S/ Robert H. Blodinger
Counsel for Defendant